

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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4 THE PORTLAND MINT,)

5 Plaintiff,) Case No.

6 vs.) 20-518C

7 THE UNITED STATES OF AMERICA,)

8 Defendant.)

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12 Via Zoom Videoconference

13 Tuesday, September 24, 2021

14 10:30 a.m.

15 Oral Argument

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19 BEFORE: THE HONORABLE MARIAN BLANK HORN

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25 Reported and Transcribed by: George Quade, CERT

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1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFF:

4 LEE VARTAN, ESQ.

5 Chiesa Shahinian & Giantomasi, P.C.

6 One Boland Drive

7 West Orange, New Jersey 07052

8 (973) 530-2107

9 (973) 530-2307 (fax)

10 lvartan@csglaw.com

11

12

13 ON BEHALF OF THE DEFENDANT:

14 ALISON S. VICKS, ESQ.

15 U.S. Department of Justice - Civil Division

16 P.O. Box 480

17 Ben Franklin Station

18 Washington, D.C. 20044

19 (202) 305-7573

20 (202) 307-0972 (fax)

21 alison.s.vicks@usdoj.gov

22

23 Also Present: Apryl Whitaker, Esq., U.S. Mint

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 10:34 a.m.)

4 THE COURT: So we're going to start the record
5 now, and let me get notices of appearance from counsel of
6 record. And if you would, please, also introduce anybody
7 that you have with you, whether they're visually present
8 or by phone, so that we know who all is listening to the
9 call and is available to us, if necessary.

10 Let's start with the Plaintiff, Mr. Vartan.

11 MR. VARTAN: Sure. Good morning, Your Honor.
12 Lee Vartan on behalf of the Plaintiff, the Portland Mint.
13 With me is my client via, I think audio only, Adam
14 Youngs.

15 THE COURT: All right. Mr. Vartan, Adam --
16 spell the last name for the reporter, please?

17 MR. VARTAN: Y-o-u-n-g-s.

18 THE COURT: All right.

19 Ms. Vicks?

20 MS. VICKS: Yes. Alison Vicks with the United
21 States Department of Justice for the United States. And
22 with me telephonically is Apryl Whitaker of the U.S.
23 Mint.

24 THE COURT: And the other folks who are either
25 on the phone or visual, at least two of them belong to

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1 me, who are my law clerks. Jason, we've got more than
2 that on here. Who are the other people, or does that
3 account for everybody?

4 JASON: I believe everyone has been accounted
5 for.

6 THE REPORTER: One of the phone lines is --
7 sorry. One of the phone lines is my backup line, the
8 3809 number.

9 THE COURT: Okay, super. Thank you. That
10 explains it.

11 All righty. So we're here on -- initially on
12 Defendant's motion to dismiss, the Complainant, Portland
13 Mint, Case Number 20-518C. And the very first thing I
14 want both parties to address when they start is really
15 what do we have here, because, yes, there are motion-to-
16 dismiss issues, but both parties seem to rely on
17 additional documents which would potentially convert this
18 to a motion for summary judgment. And the issue, of
19 course, if we do that, is whether or not additional
20 briefing is necessary before we complete summary
21 judgment.

22 I think we can get a pretty good idea of where
23 we are and what the situation is, but there are certainly
24 quite a number of additional factual matters that have
25 been used by both sides that are not attached to

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1 Plaintiff's complaint. So -- nor necessarily to the
2 motion to dismiss in ways that would not convert it to
3 summary judgment.

4 So I'd like to get your opinions, each of you,
5 as you begin on that issue, and then we'll discuss each
6 of the four counts separately and try to sort through
7 what we have here.

8 I will say this initially, having now delved as
9 deeply as I can given what I've got into the information
10 that's been filed on ECF, the manner in which the Mint
11 handled this in terms of the timing, and as I went
12 through some drafting that we've done to try to get ready
13 for today, but by no means a final opinion, I tended to
14 call the Portland Mint the Plaintiff, use that
15 denomination, and the U.S. Mint when we talk about the
16 Government institution, because in some of the filings
17 and I think it's very easy to just call it the Mint, and
18 that really doesn't get us anywhere.

19 So I would ask you to be sure that if you are
20 representing Portland Mint, we call it Portland Mint, and
21 if you're representing the Defendant, the United States,
22 you call it the U.S. Mint, and that both of you use those
23 denominations when you talk about your opponent.

24 That being said, I believe that we should start
25 in a traditional manner with respect to the motion to

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1 dismiss, but I think we're going to have to be very
2 careful how we sort through what we've really got on our
3 hands here. So we can sort it through, but we're going
4 to have to be careful how we do it.

5 So, Ms. Vicks, I would turn to you initially
6 and have you begin, and we'll go from there.

7 MS. VICKS: Okay. And did Your Honor want
8 me to start by talking about the documents, or just
9 begin --

10 THE COURT: Well, talking about not so much the
11 documents but whether we have a situation which confers
12 this motion to dismiss to a motion for summary judgment.
13 I mean, that does involve the documents, obviously,
14 but --

15 MS. VICKS: Yes, yes.

16 THE COURT: -- the harder question is that next
17 step.

18 MS. VICKS: Sure.

19 THE COURT: And feel free by all of you to have
20 coffee or water or soda. You'll see me drinking coffee
21 almost incessantly, so I don't want to do --

22 MR. VARTAN: Thank you, Your Honor.

23 THE COURT: -- anything you all can't do. So,
24 all right. Go ahead.

25 MR. VARTAN: Thank you.

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1 MS. VICKS: Thank you. So in our motion to
2 dismiss, we relied on the U.S. Mint's denial letter that
3 was issued to the Portland Mint, and that was filed with
4 this Court and attached to a status conference. And --

5 THE COURT: Let me stop you right there. Which
6 letter are you talking about? Date, time, document?
7 Where was it submitted, in which document?

8 MS. VICKS: Yes. The document was submitted,
9 it's ECF Number 34-3, and it was submitted and attached
10 to one of the status reports -- hold on, now my computer
11 has decided to be a little slow -- one of the status
12 reports ordered by the Court when the first motion to
13 dismiss -- well, it was technically our second motion to
14 dismiss, but it was attached to our status report on the
15 Mint's administrative process after we brought it to the
16 Court's attention that the Portland -- excuse me, the
17 U.S. Mint process had concluded after we filed our motion
18 to dismiss. And in December of 2020 a letter had been
19 sent to the Portland Mint telling them that their
20 submission had been denied.

21 THE COURT: And this was their "informal
22 appeal" or whatever we're going to call it, since it
23 doesn't seem to be a formal appeal?

24 MS. VICKS: So 34-3, ECF Number 34-3, is the
25 Mint's official determination of denial of redemption,

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1 and then also, as you know, there was an appeal process,
2 and that is -- was also attached to our status report,
3 Number 34. And Portland Mint did appeal, and that is
4 attached as 34-4. And we did not reference that in our
5 motion.

6 34-5 was also attached to our status
7 report. That is Portland's discovery request during the
8 appeal.

9 And then 34-6 is the Mint's response to the
10 Portland's discovery request.

11 Also attached to our status report is 34-1,
12 Exhibit A, the Mint's standard operating procedure, and
13 34-2, the referral to OIG.

14 THE COURT: I'm sorry, you said 34-1 was -- how
15 did you characterize it?

16 MS. VICKS: The Mint's standard operating --

17 THE COURT: Standard operating procedure.

18 MS. VICKS: Standard operating for the
19 redemption program.

20 THE COURT: So that raises a couple of
21 questions in terms of process. It doesn't necessarily
22 make it wrong, but it does raise some questions. And
23 that's, I think, the challenge here, is the sufficiency
24 of the process. So what you're describing as a
25 discovery request isn't actually an appeal, and is there

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1 an appeal process when the U.S. Mint decides to do
2 nothing or to string out the process or whatever we're
3 talking about?

4 MS. VICKS: Yes. As described in those
5 documents, there is an appeal of the Mint's determination
6 on redeemability, and it includes -- as you'll see in the
7 Mint's denial letter, 34-3, it includes an invitation to
8 submit additional information if Portland Mint wanted to
9 do so, and then the rest of those documents will show
10 Portland submitting an appeal and attaching its complaint
11 in this Court, and it will show Portland requesting
12 discovery, which is not part of the Mint's appeal
13 process. It's not a formal appeal process.

14 THE COURT: So where is the Mint's appeal
15 process to be found in a regulatory guideline or whatever
16 sense it happens to be?

17 MS. VICKS: Let me just pull up the standard
18 operating procedure. Yes, it is in the standard
19 operating procedure. It's Section 6.9.3.

20 THE COURT: Part of the issue here, of course,
21 is we've had multiple complaints here. And we're
22 operating, of course at this point, only on the second
23 amended complaint. Those documents were all filed before
24 the second amended complaint. How does that play into
25 what we're doing, or does it?

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1 MS. VICKS: Well, the second amended
2 complaint references the Mint's determination, and it
3 references the standard operating procedure. And in my
4 view those -- they're incorporated into the complaint,
5 and therefore valid for the Court to consider on a motion
6 to dismiss.

7 THE COURT: So that would be all of ECF-34, or
8 just part of it?

9 MS. VICKS: Well, for certain 34-3 and 34-1. I
10 do believe that the Portland Mint also references the
11 appeal process, and I can verify that. I don't think
12 they cited them, so if I do a control-F right now in the
13 document, I don't think they cited them by ECF number,
14 but they reference the determination and the appeal
15 process.

16 THE COURT: So what about the other documents?
17 Are they part of our motion to dismiss or not? And it
18 could be out of 34 or elsewhere.

19 MR. VARTAN: Can I be heard on that, Your
20 Honor?

21 THE COURT: You'll get your turn, Mr. Vartan.

22 MR. VARTAN: Oh, sure. Thank you, Your Honor.

23 MS. VICKS: The other documents that -- I don't
24 think -- let's see. I'm not sure we referenced any other
25 documents besides the denial letter, 34.3.

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1 THE COURT: Yeah, which, of course, came, what,
2 two years later or something from when this all started?
3 I'm not exactly sure of the exact timing without looking
4 at the documents right now. But that's part of the
5 problem, is some of what happened, happened only after
6 the complaint was filed -- the original. So I'm not sure
7 that's significant, but it is certainly troublesome.

8 But so -- so if, in fact, some of these
9 documents upon which your motion relies, or if, in fact,
10 your motion doesn't have enough to dispose of this on a
11 motion to dismiss, what's your position on behalf of the
12 United States in terms of converting it to the case to a
13 motion for summary judgment? And two questions there:
14 one, is it doable; two, would there be additional
15 submissions required?

16 MS. VICKS: I believe it -- yes, looking at the
17 Plaintiff's second amended complaint and our response,
18 the motion to dismiss can be converted to a motion for
19 summary judgment because the issues presented in the
20 complaint can be resolved as a matter of law.

21 THE COURT: Okay.

22 MS. VICKS: And -- yeah.

23 THE COURT: Would you feel that you briefed it
24 sufficiently for that, or would there be something else
25 that would need to come from the Government?

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1 MS. VICKS: I don't believe there would be
2 anything else needed from the Government, Your Honor.

3 THE COURT: Okay. Let's switch over briefly to
4 Mr. Vartan on this same set of issues. And I would --
5 and then we'll go to the actual counts in the complaint.
6 But, Mr. Vartan, the issue for you, I think, is much of
7 the same with the additional question as to whether if it
8 were to be converted to a motion for summary judgment,
9 whether you believe that you would want to file a cross-
10 motion or you would want in some way to add to the issues
11 on summary judgment.

12 MR. VARTAN: Thank you, Your Honor. So giving
13 it thought as you were speaking with the Government, I
14 would agree in part with the Government that this could
15 be resolved on summary judgment because I think there are
16 clear matters of law, especially with respect to Count 1.

17 THE COURT: Well, it's a question of not just
18 respect to one or more counts. You've got four counts in
19 your complaint. I think the takings is a somewhat
20 different issue, but you've got three what you've termed
21 to be related counts. I'm not sure they're as related as
22 you think, but that's a different issue.

23 The question is whether we take the whole case
24 as Ms. Vicks is suggesting, although I'm somewhat
25 surprised, Ms. Vicks, that you wouldn't want affidavits

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1 if it were to be converted to summary judgment.

2 But if you were, Mr. Vartan, to look at this as
3 a complete either motion-to-dismiss process or convert it
4 to summary judgment process, would you anticipate filing
5 a cross-motion for summary judgment, or how would you
6 want to handle it?

7 MR. VARTAN: I would, Your Honor. I would
8 anticipate that. I certainly would want not voluminous
9 supplemental briefing, but I would want to be able to
10 supplement the record if we were going to convert this to
11 a Rule 56 motion. But I do agree that -- and I
12 understand Your Honor saying that the entirety of the
13 motion would be converted, but I do think there are
14 particular counts in here that would be ripe for summary
15 judgment.

16 THE COURT: I don't follow that comment. Are
17 you saying there are counts that will be -- did you
18 misspeak and mean to say that there were counts that you
19 think would be ripe for a motion to dismiss and the rest
20 for summary judgment, or what were you trying to say?
21 I'm not sure.

22 MR. VARTAN: I was saying that I think there
23 are certain counts that the Court -- I don't think the
24 entirety of this complaint could be resolved on a motion
25 for summary judgment, but I do think certain counts could

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1 be.

2 THE COURT: Which ones?

3 MR. VARTAN: I think Count 1 in particular
4 could be. And I say that in large measure because of
5 another document that I just wanted to be sure that we
6 have a complete record of all of the additional
7 information that was either mostly used by the Government
8 in its filings. So looking at ECF Number 34, there's
9 also in Exhibit B, Your Honor, the OIG report, that was
10 attached to the Government's status report, and that was
11 -- made explicit mention in the Government's moving
12 brief, also in reply, and then as I'm sure Your Honor
13 knows, in my response.

14 THE COURT: Well, okay. All right.

15 Let's go back to you, Ms. Vicks, and let you
16 present your motion-to-dismiss argument. And -- but
17 before you do that, let me ask specifically about the
18 Office of Inspector General report that was just
19 mentioned by Mr. Vartan.

20 The document we have, I believe, is a heavily
21 redacted document. And how would you propose we use
22 that, if we should use it, and also the timing of that
23 report? That report was -- if I understand it, but it's
24 so redacted that I have a little trouble with it, but if
25 I understand it, it was a report that was developed not

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1 on this submission by the Plaintiff but on a programmatic
2 issue that arose before in which the Plaintiff
3 participated, but it wasn't the coins that are at issue
4 in this case. Is that correct or incorrect?

5 MS. VICKS: Sure, Your Honor. I do want to
6 clarify first that 34-2, which is what Mr. Vartan just
7 referenced with the referral to OIG by the U.S. Mint
8 on -- after its determination that the Portland Mint's
9 submission was not legally redeemable, I believe what
10 Mr. --

11 THE COURT: Is it -- let me just stop you.

12 MS. VICKS: Sorry.

13 THE COURT: Is it this submission or is it on
14 previous submissions? Because Portland Mint participated
15 in the program a couple of times, or multiple times. So
16 the OIG report, was that on the submission of coins that
17 we're talking about now, the ones that were either
18 totally -- well, they weren't totally melted, but the
19 ones that we're talking about that were tested and found
20 to be deficient by the regulatory standards, but -- or
21 was it on a previous set of submissions by a number of
22 parties, including Portland Mint, and then, of course,
23 leading to some legislative enactment?

24 MS. VICKS: Yes, Your Honor. So the Mint's
25 determination at 34-3 was on Portland Mint's -- excuse

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1 me, the U.S. Mint's determination at 34-3 was --

2 THE COURT: Right.

3 MS. VICKS: -- specifically about Portland
4 Mint's submission.

5 THE COURT: That wasn't my question. I'm
6 asking about the OIG report.

7 MS. VICKS: And if -- and I just want to
8 clarify that the "ETES" referred that, which Mr. Vartan
9 had referenced at 34-2, which is not an OIG report; it's
10 an OIG referral. So I'm just trying to follow --

11 THE COURT: All right. There was -- there is
12 an OIG report, and --

13 MS. VICKS: Mm-hmm.

14 THE COURT: -- if I -- there was some
15 suggestion in all of the filings that that had more to do
16 with previous activity under the program.

17 MS. VICKS: Yes. There is an OIG report that
18 is an audit of the Mint's redemption program.

19 THE COURT: Right. But that wasn't on this
20 submission, correct?

21 MS. VICKS: I'm sorry, Your Honor?

22 THE COURT: That was not on this submission
23 that's at issue that we're now having the motion
24 practice.

25 MS. VICKS: That's correct. It was -- the

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1 report is dated August 18th, 2020, and appears to mention
2 a submission that came in in August 2018, I believe. But
3 it doesn't actually analyze or make a determination about
4 Portland Mint's submission that is at issue in this case.
5 It is background information concluding that the Mint
6 needed to have stronger controls for its redemption
7 program, and after this report came out, the Mint did
8 complete revising its regulations and reimplemented its
9 program. Yes, and this report was part of the Mint's
10 process of revising its redemption program.

11 THE COURT: Right. Okay.

12 MS. VICKS: Yes.

13 THE COURT: I just want to be sure that we all
14 are on the same page because there was an intermingling
15 of some of this Office of Inspector General activity, and
16 that OIG report is not really, except as background,
17 relevant to the case. So I just want that to be very,
18 very clear.

19 All right.

20 MR. VARTAN: Your Honor, could I be heard on
21 that one point?

22 THE COURT: No. Let's just move on right now
23 and have a complete presentation by Ms. Vicks.

24 MR. VARTAN: Sure.

25 THE COURT: I've interrupted her enough, but I

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1 wanted to get some basic stuff done so that we're all on
2 the same page.

3 As is normal, take some notes and you can
4 address it when it's your turn.

5 MR. VARTAN: Very good. Thank you, Your Honor.

6 THE COURT: All right. Ms. Vicks, you're on.
7 Go ahead and take your sip of water. That's all right.
8 I don't want to interrupt that. If you need it, take it.

9 MS. VICKS: All right, thank you. So good
10 morning and may it please the Court. I'm going to
11 address the first count of Portland Mint's complaint for
12 a regulatory violation. And this count can be resolved
13 on a motion to dismiss as a matter of law because
14 Portland Mint makes the contention throughout its
15 complaint that its coins were redeemed upon delivery and
16 that nothing else matters.

17 And all this Court has to do to resolve that
18 issue is actually look at the Mint's regulations at 31
19 CFR 100.1 and see if the Mint followed its regulatory
20 program when it denied redemption of the Portland Mint's
21 submission.

22 THE COURT: All right. Let's back up a moment
23 here. Everything that has been briefed is dependent on
24 that regulation at 31 CFR 100.11. And is there -- or
25 what is the money-mandating authority for jurisdiction,

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1 and is there any statutory background behind 31 CFR
2 100.11?

3 MS. VICKS: Yes. So 31 CFR 100.11 was
4 promulgated under the Secretary's authority at 31 USC
5 5120, which authorizes the Secretary to melt mutilated
6 coins.

7 THE COURT: Okay.

8 MS. VICKS: To melt obsoleted or worn United
9 States coins withdrawn from circulation. It does not --
10 the statute itself does not say anything about payment
11 for any such coins that are melted. The regulation -- so
12 that doesn't have statutory backing for payments of
13 money, but the regulation does contemplate that coins
14 that are submitted and found to be legally redeemable as
15 determined by the Mint in its program will receive
16 payment at the rate set forward in Section (d) of the
17 regulation.

18 So a plaintiff who comes to the Court and has
19 -- you know, potentially has a determination from the
20 Mint that its coins are legally redeemable but has not
21 received payment, may have a claim under this regulation
22 for money damages.

23 THE COURT: All right. And a lot of dancing
24 around in some of the briefs without ever kind of
25 defining "redeem" or "redeemed." That's obviously

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1 critical to our consideration here. Is there a
2 definition of redeem or redeemed anywhere that you would
3 point to? Is it in other regulations? Is there a
4 definitional part or a preamble that would give us that
5 to the regulation, or are we getting it from case law,
6 and, if so, from which case law? Because that is totally
7 critical to what we're doing here as to how we define
8 redeem and not lose -- and it's either redeem or
9 redeemed, but how we not lose sight of the definition of
10 "redeem" because there's a very different perception
11 between Defendant and Plaintiff. Submission is not the
12 same thing as redeemed, it seems to me. But that's what
13 the complaint kind of entangles.

14 So tell me where you're getting your definition
15 other than a reading of the regulation, which is a
16 legitimate way to go, and that's certainly one of the
17 ways that I think we might get there, but is there any
18 definitional assistance we can get for the concept of
19 "redeemed"?

20 MS. VICKS: I do believe that the main
21 assistance we'll get is from the regulation itself, which
22 is, you know, titled Request for Examination of Bent or
23 Partial Coin for Partial Redemption -- excuse me, for
24 Possible Redemption. And then it sets forth the program
25 by which the Mint will accept submissions and the

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1 conditions under which it will actually pay for those
2 submissions.

3 I would have to -- yes, I would say that, you
4 know, only after the U.S. Mint determines that the coins
5 submitted are genuine legal tender and suitable for
6 redemption can they be exchanged for payment, or in other
7 words redeemed, in the manner and at the rate set forth
8 in the regulations.

9 I would have to do a little bit of research to
10 see if "redeem" is -- is -- excuse me, defined anywhere
11 else, but I do believe that the rates set forth in the --
12 in Section D are an approximation of what -- are a one-
13 to-one approximation of genuine currency. So, for
14 instance, a pound of one-cent coins, as mentioned in
15 D(1)(i), is \$1.4585 per pound. I believe that's an
16 estimation of what a pound of one-cent coins is worth,
17 and that's where the -- so it's essentially a one-for-one
18 exchange program.

19 We do mention in our -- or we do reference in
20 our motion to dismiss, which was also referenced in the
21 complaint, an article where a Mint employee was
22 interviewed and said these programs are essentially one-
23 for-one exchange programs of legal tender -- purportedly
24 legal tender as verified for valid legal tender.

25 We -- if this were converted to a motion for

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1 summary judgment, that may be something we would provide
2 additional briefing or an affidavit on, but I think it's
3 pretty clearly set forth in the regulations that
4 redemption means at these rates after the Mint has
5 examined a submission and determined that they are
6 legally redeemable.

7 THE COURT: Okay. So you're saying there's not
8 a preamble or definitional section that gives us that.

9 MS. VICKS: Not that I am aware of at this
10 time. But I would want to actually look at the
11 regulations again to confirm.

12 THE COURT: Okay. We have looked at it, but --
13 we've searched it. All right, go ahead.

14 MS. VICKS: Oh, sure. So, you know, the
15 Plaintiff's allegation of a regulatory violation is
16 premised on their allegation that they're basically --
17 their delivery of coins was redeemed as soon as it was
18 delivered. And in order to resolve that count, all this
19 Court needs to do is look at the regulations themselves
20 and interpret them and decide whether Portland Mint has
21 stated a claim and has identified a regulatory violation.

22 THE COURT: Okay. Look at the regulation with
23 me if you would for a moment because the regulation, like
24 many obviously, could be more clear. It looks as if, if
25 you look at (c)(6), it says no redemption will be made

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1 when -- and then you've got one, two, and three. And my
2 question to you is which of those was the determination
3 with respect to the Plaintiff's coinage that made it
4 ineligible for payment according to the U.S. Mint?

5 MS. VICKS: It was all three of those listed in
6 the Mint's determination letter.

7 THE COURT: So you're saying it was an
8 intentional mutilation?

9 MS. VICKS: Well, the determination letter
10 specifically says --

11 THE COURT: Or was it an attempt -- or was it
12 an attempt to defraud out of number one? There are two
13 options there.

14 MS. VICKS: Yes. So as you know, in the
15 determination letter, the Mint determined that Portland
16 Mint's -- the U.S. Mint determined that Portland Mint's
17 submission contained counterfeit coins, and, therefore,
18 they determined that no redemption would be made under 34
19 CFR 100.11(c)(6)(I), in an attempt to defraud the United
20 States, and they also reference (ii) and (iii) if it
21 appears to be part of or intended to further criminal
22 activity, or a submission contains a material
23 misrepresentation of fact.

24 THE COURT: Okay. So the mutilation was not
25 part of it, the intentional mutilation. Is that the one

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1 that drops out?

2 MS. VICKS: No, that's in there. It says a
3 submission or any portion of a submission demonstrates a
4 pattern of intentional mutilation or an attempt fraud the
5 United States.

6 THE COURT: No. I'm not saying is it in the
7 regulation. I'm asking in the --

8 MS. VICKS: No, it's in the letter, Your Honor.
9 It is in the letter, Your Honor.

10 THE COURT: So they just did boilerplate and
11 threw everything in? Is there any evidence in the case
12 that we have in front of us so far that there was
13 intentional mutilation?

14 MS. VICKS: There is nothing that has been
15 presented about intentional mutilation.

16 THE COURT: Okay. All right. I just want to
17 be absolutely clear here because we -- there's been a lot
18 of sort of fuzzy back-and-forth. So -- particularly in
19 the words that the Plaintiff has used in terms of sort of
20 big generic statements. I think we need to bring this
21 down, and Mr. Vartan will have an opportunity to explain
22 exactly what he's alleging happened here. So, all right,
23 go ahead, Ms. Vicks.

24 MS. VICKS: So if this Court were to actually
25 interpret the regulations at issue and the Mint's

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1 determination letter against what Portland has actually
2 alleged, it would find that -- it would determine that
3 Portland has not stated a claim for a violation of the
4 regulations.

5 THE COURT: Okay. Now, who signed the
6 determination? It says in the regulation it can be the
7 director of the United States Mint or a designee. Was it
8 done by an authorized designee?

9 MS. VICKS: Yes, Your Honor. It was signed by
10 -- let me pull it up. I just had it right here. It was
11 signed by Richard Robidoux -- Robidoux, I think that's
12 how you say it, Division Chief of Engineering. We did
13 not attach to that letter or to anything submitted in
14 this Court that he is an authorized designee of the
15 director of the Mint. David Croft is the director of the
16 Mint.

17 THE COURT: All right. I don't know that this
18 is an issue or not, but I noticed that it was named with
19 an unusual title for that kind of decision-making, but it
20 could be perfectly appropriate, and I just thought I
21 would ask.

22 MS. VICKS: I understand, Your Honor.

23 THE COURT: But perhaps you can get us
24 something that just indicates that that is not a problem.

25 MS. VICKS: Yes, we could do that.

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1 THE COURT: Because the director -- the
2 engineering title is not a -- is not typical of that kind
3 of decision-making, but it could be proper. I don't know
4 the Mint well enough to know. All right, go ahead.

5 MS. VICKS: I will note that the denial of
6 Portland Mint's appeal of the final determination was
7 signed by David Croft, who is the director of the Mint.

8 THE COURT: I saw that. That's one of the
9 reasons I raised it. I saw that disparity. Go ahead.

10 MS. VICKS: Sure. So under an actual
11 interpretation of the regulations, which provide that
12 coins will be submitted for examination and possible
13 redemption, that a person who submits coins to the
14 program agrees to be governed by that program, and that
15 the Mint may sample submissions for authenticity, and the
16 Mint may deny redemption.

17 The Court will see that the Mint followed its
18 process as set forth in the regulations and that the
19 regulations do not provide that redemption happens
20 automatically upon delivery or any other physical act.

21 So Portland's allegation that its coins are
22 redeemed basically as soon as they were turned over to
23 the Mint fails under a straightforward reading of the
24 regulations.

25 The denial letter, which was incorporated into

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1 the Plaintiff's complaint, as we mentioned, makes clear
2 that the coins were denied redemption pursuant to the
3 Mint's regulations, and after the Mint followed its
4 process as set forth in the regulations.

5 You know, this Court does have the power to
6 look at these regulations and interpret them, and
7 Portland's claim that throughout its complaint it alleges
8 that its coins were redeemed upon delivery, acceptance,
9 or some other physical act, which is just simply not
10 supported by any interpretation of the regulations which
11 set forth how coins are actually redeemed. So Portland
12 has failed to identify a regulatory violation as it must
13 in order to state a claim for a regulatory violation in
14 this Court, and its first count must be dismissed.

15 If Your Honor would like me to continue to
16 another count or has additional questions, I will just
17 note that Portland appears to largely ignore the Mint's
18 determination and to basically impugn it or call it into
19 question, but that the determination is properly before
20 the Court because it was incorporated into the
21 Plaintiff's complaint.

22 And the Court can consider it and it can
23 consider also the standard operating procedure, which
24 was, I think, also mentioned in the complaint but at
25 least in their response brief.

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1 THE COURT: Are you moving on to the contract
2 claim?

3 MS. VICKS: Yes, unless Your Honor has any
4 questions.

5 THE COURT: No, go ahead. Go ahead.

6 MS. VICKS: Okay. Portland's contract claim
7 should be dismissed because it is also entirely governed
8 by the regulations at issue here, as Portland even admits
9 in its complaint and its response.

10 So setting aside whether it's an implied-in-law
11 or an implied-in-fact contract, and just going with, you
12 know, he's attempted to plead an implied-in-fact
13 contract, the claim must be dismissed because it fails to
14 state a claim. And Portland has failed to establish all
15 of the elements of an implied-in-fact contract.

16 Specifically, for its implied contract claim,
17 Portland relies on the Mint's regulations as evidence of
18 the Government's intent to contract -- excuse me, intent
19 to contract. For instance, in the second amended
20 complaint at Paragraphs 91 to 92, Portland alleges that
21 mutual intent to contract was demonstrated by Portland's
22 acceptance into the redemption program and that the
23 essential terms of the contract were found in the Mint's
24 regulations.

25 So the Supreme Court has held that there is a

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1 presumption against laws creating contractual rights
2 absent clear indication from the legislature that the law
3 is intended to create a contract. So whether this is,
4 you know, construed as a contract implied in law or a
5 contract implied in fact, Portland admits that the
6 alleged contract is governed by the terms of the
7 regulations.

8 So in instances such as --

9 THE COURT: Well, let me interrupt here. Would
10 a contract ever come into place under this regulatory
11 framework?

12 MS. VICKS: No. The regulations do not show an
13 intent to form a contract. It -- the regulations simply
14 set forth a program by which participants can submit
15 coins as a request for examination and possible
16 redemption. The Mint has -- the regulations don't set
17 forth authority to contract for these coins at all. And,
18 you know, there's nothing in the Mint's regulations that
19 speak of creating a contract. There's nothing in the
20 statute about melting worn or obsolete coins that speaks
21 about creating a contract.

22 And the Constitution, which is relevant here to
23 the extent that Article 1, Section 8, you know, gives
24 Congress the power to make coinage, and Congress has
25 delegated that power to the Mint, certainly doesn't speak

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1 of contracting for exchange of currency in this type of
2 way.

3 THE COURT: So, of course, this Court has only
4 one of the two forms of implied contract --

5 MS. VICKS: Yes.

6 THE COURT: -- available to it. Is there any
7 conceivable way in which an implied contract could come
8 into being in this Court under these circumstances?

9 MS. VICKS: No, Your Honor, because the Court
10 -- because the Plaintiff cannot demonstrate mutuality of
11 intent to contract. Instead, all Portland has alleged is
12 that the various parties involved, the Plaintiff and the
13 Mint employees, were undertaking roles pursuant to their
14 -- pursuant to the regulations. For instance, Portland
15 was submitting coins for examination, and the Mint
16 employees were performing their role to direct delivery,
17 which is actually set forth in the regulation at Section
18 (e), and to receive the delivery.

19 The regs -- the regulations certainly don't
20 provide for the execution of a written contract on behalf
21 of the United States. And -- I'm sorry, I just lost my
22 place for a second. All that Portland's allegations show
23 are that, you know, Portland Mint voluntarily applied to
24 participate in this program; it voluntarily brought a
25 submission to be examined; Mint employees, in their role

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1 in this program, accepted that; and the Mint processed
2 Portland Mint's submission according to its regulations.

3 Portland's allegations also show that it knew
4 its submission would be, you know, subject to a melt upon
5 delivery. And so --

6 THE COURT: And where is that? What -- what --
7 I mean, we've got some very strange timelines in here.
8 And a quick melt, a long process, maybe on a portion of
9 it, not even clear how much of a portion was retained;
10 whether there's anything retained at this point. I'm not
11 saying that necessarily justifies Plaintiff's complaint,
12 but is it -- where does it say in the regulations or
13 elsewhere or in their operating procedures or in some
14 document that the Plaintiff would have known about that
15 they would, upon submission, quickly be melted down and a
16 portion kept or not? Where is that process laid out?

17 MS. VICKS: The regulations provide that the
18 Mint may sample submissions for authenticity. And
19 Plaintiff's own complaint says that Mr. Youngs was
20 wanting to accompany his delivery and witness the melt,
21 which took place over two days. So however it was set
22 forth to the Plaintiff, he knew that these -- that a
23 large portion of his submission -- or that his submission
24 would be subject to a melt.

25 He also had the regulations, could have

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1 surmised that the Mint would take samples in order to
2 ensure the authenticity of the submission.

3 THE COURT: There were a couple of mental leaps
4 in there. You said he wanted to accompany his submission
5 delivery. Where is that?

6 MS. VICKS: That is in his complaint, Your
7 Honor.

8 THE COURT: Okay.

9 MS. VICKS: He wanted to witness the melt, yes.

10 THE COURT: Okay. But how about did he witness
11 the melt? Do we know that, or we just know that he
12 wanted --

13 MS. VICKS: We -- if you construe that
14 allegation as true, Your Honor, he did not witness the
15 melt.

16 THE COURT: I'm not sure that's critical, but I
17 think -- and he did not know what was withheld, correct?
18 And, again, I'm not sure that's critical, but there are a
19 couple of mental leaps from the complaint to knowing
20 exactly what occurred at the time. And one of the
21 allegations in the complaint, I believe, is that the
22 Plaintiff essentially thought they ought to be allowed to
23 also sample and test a part of the submission if the Mint
24 was going to be -- or wanted to, and if not, was entitled
25 to.

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1 Is that typical or is that allowed for in the
2 procedures, or does that typically happen, or obviously
3 they wanted to do it once there was found to be
4 counterfeit issues? But how is that usually handled? Is
5 it only a one-way testing by the U.S. Mint, or is there
6 an opportunity for a counter-test for the Plaintiff?

7 MS. VICKS: My answer to that, Your Honor, is
8 the Plaintiff is allowed to do whatever he wants with his
9 mutilated coins prior to submitting them. So he can
10 subject them to tests and bring those testing results and
11 have those testing results with him. The testing that is
12 provided for in the regulation --

13 THE COURT: You're saying it would -- that
14 would all be prior, in other words?

15 MS. VICKS: Yeah, if the Plaintiff chose to do
16 that, yes.

17 THE COURT: Okay. But there's nothing that --
18 in the operating procedures or in something that is sort
19 of standard that allows for a simultaneous testing. And
20 it seems to be one of the things Plaintiff wanted at some
21 point. I'm not sure they were entitled to it, but your
22 position would be on behalf of the Mint that it would
23 have had to have occurred before submission.

24 MS. VICKS: Yes, and that the regulations
25 provide that the Mint will test and sample for

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1 authenticity. You are correct that in the course of
2 proceedings before this Court, and as the Mint was
3 finishing its administrative process, Portland Mint
4 requested discovery, and that was denied because the
5 Mint's appeal process does not include discovery, but the
6 Mint does still have samples.

7 THE COURT: They do still currently have
8 samples?

9 MS. VICKS: I -- last I heard, yes, they do.

10 THE COURT: Can you confirm that with your
11 agency person?

12 MS. VICKS: Yes, but I don't think that given
13 what the complaint has alleged here that the ability of
14 the Plaintiff to sample is relevant to disposition of the
15 case at this point.

16 THE COURT: Do they have samples, yes or no?

17 MS. VICKS: Well, Agency counsel --

18 MS. WHITAKER: This is Ms. Whitaker, Agency
19 counsel for the Mint. I can confirm that we have
20 retained the samples.

21 THE COURT: Okay. You don't know or you don't
22 want to confirm?

23 MS. VICKS: No, she did confirm, Your Honor.

24 MS. WHITAKER: I can confirm.

25 THE COURT: I'm sorry, Ms. Whitaker?

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1 MS. WHITAKER: Yes, I can affirmatively confirm
2 that we have retained the samples.

3 THE COURT: You do have samples, yes -- yes or
4 no? Let's be clear here. I don't like the hedging.

5 MS. WHITAKER: Yes, Your Honor.

6 THE COURT: All right. Okay. All right.
7 Go ahead, Ms. Vicks.

8 MS. VICKS: Sure. So Portland Mint urges the
9 Court to discern contractual intent from the word
10 "redeem" and the actions that the Portland Mint and the
11 U.S. Mint undertook, but this Court must interpret the
12 language in the context in which it is written, and
13 nothing in the regulation speaks of a contract, nor do
14 the regulations provide that redemption happens or a
15 contract is formed based on delivery, acceptance, or any
16 other physical act regarding the coins.

17 Rather, redemption is a legal determination
18 made by the Mint after application of its regulations at
19 31 CFR 100.11. As this Court is likely very well aware,
20 the Supreme Court has said that a court should not infer
21 a contractual undertaking without adequate expression of
22 an actual intent of the state to bind itself, and that
23 has to be found in the regulations or a statute.

24 And the Portland Mint argues that intent to
25 contract and offer and acceptance are evident from the

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1 actions of the parties, but as we have pointed out, the
2 language and structure of the regulations do not reflect
3 a bargain for quid pro quo or any negotiations or even
4 that the Mint has any negotiating power. The redemption
5 rate is not framed as a contractual obligation of the
6 Mint but rather as a payment to those whose submissions
7 comply with all of the conditions of the regulation.

8 So a proper interpretation of the regulations
9 here show that they do not demonstrate the Government's
10 clear intent to confer best bid contractual rights on
11 persons who submit coins for examination and possible
12 redemption by the Mint. Therefore, the complaint does
13 not plead facts sufficient to establish the Government's
14 intent to contract and, therefore, fails to state a
15 plausible claim for breach of contract and must be
16 dismissed.

17 The complaint --

18 THE COURT: Let me stop you -- let me stop you
19 for just a moment if you wouldn't mind.

20 MS. VICKS: Yes.

21 THE COURT: I'll be right back.

22 (Brief pause in the proceedings.)

23 THE COURT: Sorry about that. I was just
24 trying to quiet some noise outside, but I didn't succeed.

25 All right. Go ahead, Ms. Vicks. You were --

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1 you were finishing up, I think, on the contract issues.

2 MS. VICKS: Yes. I just wanted to briefly
3 address the issue of authority to contract on behalf of
4 Mr. Anthony Holmes, Jr. The most salient point here is
5 that the regulation says the director of the Mint or a
6 designee with final authority with respect to all aspects
7 of redemption of bent or partial coin commissions. The
8 director of the Mint is appointed by the President
9 pursuant to 31 USC 304, and -- which provides that the
10 director shall carry out duties and powers proscribed by
11 the Secretary of the Treasury.

12 There is -- so in the first instance, the
13 authority of Mr. Holmes and other Mint employees to
14 contract was knowable by reading the regulations, and the
15 -- you know, the regulations do not support a reading
16 that they did have such contracting authority.

17 To our knowledge, Portland Mint is not alleging
18 that Mr. Holmes was acting ultra vires but under his
19 authority, and so Portland must establish that Mr. Holmes
20 had actual authority; otherwise, its claims fail.

21 And for a case on that point that the absence
22 of authority is dispositive, I have Doe. v. United
23 States, which is a Federal Circuit case. The cite is 100
24 F.3d 1576. All Plaintiff here has alleged is apparent
25 authority, and the Federal Circuit has also held that

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1 apparent authority will not suffice to hold the
2 Government bound by the agents of its -- acts of its
3 agents.

4 So Portland's allegations show that it appeared
5 to the Portland Mint that Mr. Holmes had contracting
6 authority because he communicated with the Portland Mint
7 about delivery of its submission. He received the
8 delivery and he apparently told the Portland Mint the
9 schedule for when payments for redemption usually issue.

10 Portland's subjective belief that Mr. Holmes
11 had authority to contract is irrelevant. The Supreme
12 Court has held that people dealing with a government
13 agent are presumed to know his exclusive authority for it
14 is public law.

15 So in addition to failing to establish
16 mutuality of intent and offer and acceptance, or that the
17 regulations evidence an intent to contract, the Portland
18 Mint has failed to adequately allege that Mr. Holmes had
19 actual authority to contract, rather than just apparent
20 authority. For that reason as well, its contract claim
21 must be dismissed.

22 THE COURT: Okay. So that, in your view, takes
23 care of Counts 2 and 3?

24 MS. VICKS: Yes, because if there is no
25 contract established, there is no breach of the duty of

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1 good faith and fair dealing.

2 THE COURT: Okay. So the duty of good faith
3 and fair dealing is dependent upon there being a
4 contract. Is that what you're saying?

5 MS. VICKS: Yes, Your Honor, that a breach for
6 the implied duty of good faith and fair dealing depends
7 on the existence of a valid contract. And, here, the
8 Portland Mint has not established the existence of a
9 valid contract.

10 THE COURT: Okay. And what's your authority
11 for that?

12 MS. VICKS: Centex Corp. v. United States, 395
13 F.3d 1283, pincite 1304, Federal Circuit in 2005.

14 THE COURT: Okay. Let's talk about takings.

15 MS. VICKS: Yes, Your Honor. Portland's
16 takings claim should be dismissed because it is also
17 wholly governed by the regulations at issue in this case.

18 Although before I get to that, and actually
19 pursuant to the regulations, Portland admits that it
20 voluntarily delivered its coins to the foundry. And it
21 is axiomatic that a voluntary transfer of property cannot
22 -- sorry, a voluntary transfer of property cannot
23 constitute a taking.

24 The Portland Mint voluntarily delivered their
25 coins to the U.S. Mint. There was no required

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1 acquiescence, which the Supreme Court has held is at the
2 heart of a takings case. The Mint -- the U.S. Mint did
3 not require the Portland Mint to participate in its
4 redemption program, nor did the U.S. Mint require the
5 Portland Mint to submit any coins.

6 So on the face of Plaintiff's complaint alone
7 where he admits that he aggregates coins as a business
8 opportunity and submits them to the Mint, this Court
9 could dispose of the takings claim because he voluntarily
10 transferred his property.

11 THE COURT: What about in a takings claim, does
12 the Plaintiff have to admit the legitimacy of the
13 Government's actions in some way or not?

14 MS. VICKS: Yes, Your Honor. A takings claim
15 must be premised on lawful government action, and, here,
16 the Government's lawful action was to receive the
17 submission of Portland's coins and process it through its
18 program, and it determined as a legal matter that the
19 submission was not redeemable.

20 So to the extent that -- you know, I could read
21 Portland's complaint as saying that the Mint lawfully had
22 possession of its coins, and then at some point later was
23 converted to a taking. The Court would have to ask the
24 question of first why did the Mint lawfully have
25 Portland's submission, and it was because, A, the Mint --

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1 it was because the Portland Mint voluntarily submitted
2 those coins to the U.S. Mint, and then the Court would
3 have to ask why did the U.S. Mint lawfully keep the
4 coins. And the U.S. Mint lawfully kept the coins because
5 it determined, pursuant to its regulations, that the
6 coins were legally nonredeemable and, moreover, were
7 counterfeit and could not be returned or paid for because
8 they are contraband and subject to forfeiture.

9 THE COURT: Okay. And the subject of
10 forfeiture is outlined where?

11 MS. VICKS: The forfeiture is mentioned in 18
12 USC 492, which provides that counterfeit coins are
13 contraband, per se, and are forfeited.

14 THE COURT: For -- did you say 14 or 492?

15 MS. VICKS: I -- I meant to say 492. So 18 USC
16 492.

17 THE COURT: Okay.

18 MS. VICKS: And a final point that Portland
19 bases its takings claim on a regulatory violation. In
20 other words, it bases its taking claim on the U.S. Mint's
21 failure to pay the rates established by the regulations.
22 A claim premised on a regulatory violation does not state
23 a claim for a taking. If this Court were to entertain a
24 claim for a regulatory violation, it can do so adequately
25 under Count 1 and does not need to do so under a takings

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1 claim.

2 And, moreover, you know, there's ample
3 authority that a takings claim premised on allegations
4 that the Government agency violated statute or -- excuse
5 me, statute or regulations is not a proper basis on which
6 to bring a takings claim. And just one cite for that is
7 Acadia Tech at 458 F.3d 1331.

8 THE COURT: Okay. Anything else, Ms. Vicks?

9 MS. VICKS: Unless Your Honor has any
10 questions, not at this time.

11 THE COURT: I'm good at the moment. Thank you.

12 Mr. Vartan, do you want a moment to collect
13 your thoughts, and we've been at this for a bit? Does
14 everybody want about a five-minute break to take care of
15 necessary, and, let's say, a ten-minute break and then
16 we'll be back and have you come up, give you a chance to
17 organize your thoughts.

18 I think you've heard a lot that was developed,
19 the Defendant's motion to dismiss, and so I want to be
20 sure that you have an opportunity to digest that because
21 it does challenge a lot of the assertions you've made in
22 your complaint.

23 So we'll take a ten-minute break. I believe it
24 is 11:39, so 11:40. We'll be back at 11:50.

25 MR. VARTAN: Thank you, Judge.

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1 THE COURT: Thank you.

2 MS. VICKS: Thank you, Your Honor.

3 (Court in recess.)

4 THE COURT: All right. It looks like the
5 critical people are back. So, Mr. Vartan, you're up.
6 Let's take these items count by count, as Ms. Vicks did,
7 and try to join the issues.

8 Let's start with discussion of the regulations,
9 and particularly the concept of redeem versus submitted,
10 and the authority of the agency to do the testing and
11 then their conclusions and how they arrived at it. I
12 will admit that that prevarication on whether or not
13 there was still coins was unfortunate. Again, I'm not
14 sure it's significant for our purposes, but it is
15 unfortunate that the agency -- and that, Ms. Vicks, you
16 tried to help her out, which was not a good idea if you
17 knew the answer, and the agency person certainly was not
18 being forthright.

19 So with that, as I say, it may be ancillary to
20 where we have to go here, but it does support the issues
21 of how the agency behaved throughout this process in
22 terms of the timeline and the time lag, particularly.

23 But, Mr. Vartan, your opportunity to respond to
24 what Ms. Vicks has put on the table both in her briefs
25 and now at the oral argument.

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1 MR. VARTAN: Thank you, Judge.

2 THE COURT: She amplified some, I think. I've
3 joined the issues, I think, better than they've been
4 joined previously by both parties, but go ahead.

5 MR. VARTAN: Thank you, Your Honor. So I'll
6 start with Count 1 and the definition of "redeem." I
7 think Your Honor said -- I took a note -- that the
8 definition is totally critical here, and certainly I
9 would agree with that characterization. And it sounds
10 like I did the same thing as you, spending a lot of time
11 trying to figure out if "redeem" was elsewhere defined
12 either in statute or regulation. I came up short.

13 And I think the key issue here, at least from
14 my perspective, is that there is no definition of
15 "redeem" standing here today or being here together on
16 Zoom that anyone can point to with any definiteness.

17 And so given that that is the case, and given
18 that we're on a motion to dismiss, and Plaintiff's well-
19 pled allegations need to be accepted as true, and
20 certainly there's been no discovery in this case, I would
21 submit that we cannot, standing here today, determine the
22 definition of "redeem." We certainly can't define it the
23 way the Government has defined it. And I think Your
24 Honor did -- was looking to get an actual definition from
25 Ms. Vicks as to how the Government defines "redeem." And

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1 so far today, and also in the Government's papers, there
2 is no definition.

3 Now, we've proffered a definition that we
4 believe is right, meaning --

5 THE COURT: Well, let's stop -- let's stop
6 right a moment. To the extent that there's a definition,
7 and I didn't say otherwise, it is in the regulation and
8 the steps that can be taken in the regulation, it would
9 have been easier if there was an actual definition. But
10 not being the case, we look at the regulation and
11 particularly, you know, 21 CFR 100.11, and particularly
12 the redemption process part of that regulation, and more
13 particularly, as I had a conversation with Ms. Vicks
14 during the oral argument as well, Subpart (c)(6), which
15 does give you a definition of when it is not redeemed as
16 opposed to perhaps when it is redeemed, and I'm not sure
17 you can say there's nothing in here that establishes the
18 process of redemption and, therefore, when it's not
19 redeemed.

20 So how do you deal with what is clearly in the
21 regulation as to how a submission of coinage is not
22 redeemed?

23 MR. VARTAN: Well, because ultimately the -- it
24 still gets to the heart of the definition of
25 "redemption," and what we've alleged to have gone on

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1 here, Your Honor, which is that the coins were actually
2 redeemed, meaning -- redemption can only mean, at least
3 from Plaintiff's perspective -- and I think that this is
4 a question to be determined ultimately, of course, by the
5 Court -- but "redemption" can only mean use by the Mint.
6 And I'm saying that not based upon --

7 THE COURT: I'm sorry, say that again? Can
8 only mean --

9 MR. VARTAN: Can only mean used by the Mint.
10 And I'm saying that not only because that would be the
11 common sense definition, meaning that if the coins were
12 counterfeit or otherwise fell under Subsection (6), the
13 Mint wouldn't use them, but I'm also saying that because
14 going back to, I guess, the very beginning of the
15 conversation when Your Honor was raising some of the
16 ancillary documents, the Mint's own SOP that is part of
17 the record at this point, and I'm happy to direct Your
18 Honor to it. The Mint's own SOP says that where coins
19 are fraudulent or any of the other Subsections 1 through
20 I that you walked through with Ms. Vicks, that they'd
21 either be scrapped or returned to the sender.

22 THE COURT: Okay. Where does it say return to
23 the sender?

24 MR. VARTAN: Sure. So, Your Honor, I would
25 direct you to -- it would be ECF Number 56, Exhibit B, to

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1 -- which is Number 3 on the attachments to my
2 certification, is the Mint's SOP. And I'll give you the
3 exact page number.

4 So, Your Honor, this would be page 9 of the
5 document. It's Section 6.8.2. The overall section is
6 6.8, Other Procedures and Policies. But 6.8.2 says --
7 and I'm quoting -- "If coin was submitted with the
8 application, the rejected coin is segregated from other
9 shipments and held in the mutilated coin section until
10 the participant claims it, or it is scrapped."

11 And so there is very much a difference in the
12 Mint's own SOP -- and this is, of course, without the
13 benefit of discovery three years removed from August of
14 2018 -- but the very little information that we do have,
15 the Mint is very explicitly saying that when coins are
16 counterfeit, they're put to the side. They're not put
17 through --

18 THE COURT: Okay. Well, let me ask you this:
19 Is it your position then -- excuse me, and I have to say
20 the complaint was -- even the second amended complaint
21 was not very clear in some of these issues that you're
22 now raising. Is it your position that essentially by the
23 standard operating procedures the testing would have to
24 go before it was melted?

25 MR. VARTAN: It would -- before it was melted

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1 and used. Right? So there's a difference between --

2 THE COURT: So what's the difference in melted
3 and used? Once it's melted, it's no longer segregable.
4 Right?

5 MR. VARTAN: Well, I mean it could be -- it
6 could be scrapped, as the SOP is saying. The whole -- it
7 probably makes sense, Your Honor, just to take a step
8 back in terms of the actual --

9 THE COURT: What's the critical point at which
10 you say that it is redeemed? Is it when it's submitted?
11 That's clearly not it.

12 MR. VARTAN: No.

13 THE COURT: Is the next one when it's melted,
14 or when it was reused allegedly, which we don't even know
15 for sure -- reused as new coinage?

16 MR. VARTAN: It would be when it was used for
17 new coinage, right, because ultimately the whole purpose
18 of this program, aside from giving individuals and
19 companies an avenue to redeem mutilated coins, is to
20 allow the Mint to manufacture new, genuine, of course,
21 U.S. coinage. And, Your Honor is correct that we don't
22 know for sure what happened to the 99 -- literally
23 99.99918 percent of the shipment was melted. We all are
24 in agreement on that. We don't know ultimately what
25 happened to the shipment, but certainly we've alleged in

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1 the complaint, and that has to be accepted as true for
2 purposes of this motion, that the shipment was melted and
3 used to manufacture new coinage.

4 And I would note, of course, that --

5 THE COURT: Well, what's your basis for even
6 alleging that?

7 MR. VARTAN: Well, the basis for alleging it is
8 that, number one, Mr. Youngs was told by Anthony Holmes,
9 Jr., that everything had proceeded very smoothly and that
10 payment would be expected in four to six weeks. Mr.
11 Holmes and Mr. Brown, a second Mint employee, encouraged
12 Mr. Youngs to submit additional shipments. And it would
13 -- it stands to reason that if this was melted, it's
14 going to be melted for a purpose, meaning to make new
15 coinage.

16 And so we've alleged that in the complaint.
17 There's nothing to the contrary. And at this point, it
18 needs to be accepted as true. And the only two documents
19 that we're aware of at this point, Your Honor, that bear
20 upon this issue, one is the SOP -- and I cited the
21 relevant provision there, 6.8.2, that if something is
22 counterfeit, presumably it's not going to be put into
23 circulation by the U.S. Mint, who is responsible for
24 coining genuine U.S. coins. And then I would go back as
25 well, Your Honor, to Attachment A to my certification

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1 because, again, we began the conversation by saying this
2 OIG report from, I believe it's August 20, I think it's
3 August 18 of 2020, but let me get the right date.

4 Right, August 18 of 2020. That audit report is
5 obviously produced by the Office of Inspector General,
6 Department of the Treasury. So it's coming from the
7 Treasury Department. It's not redacted. Your Honor may
8 have been thinking about another document. This document
9 exists and is publicly available. You can read it from
10 start to finish.

11 And I would push back on the notion, Your
12 Honor, that this document doesn't have direct bearing on
13 this case. And keep in mind, this document was submitted
14 by the Government as part of its brief. It's not
15 something that I provided --

16 THE COURT: I believe -- I said I didn't think
17 it had bearing on the case. So that's exactly [brief
18 audio lapse].

19 MR. VARTAN: So let me just clarify why I think
20 that it does have bearing on this case and bearing in
21 particular on this redemption and the definition of
22 "redemption."

23 So if Your Honor --

24 THE COURT: Well, it wasn't for this -- that
25 OIG report was not for this submission of coinage. It

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1 was prior to it. Correct?

2 MR. VARTAN: No. And so that's an important
3 point of clarification. So --

4 THE COURT: Well, there's real confusion in the
5 record on that.

6 MR. VARTAN: Well, I think that's partly
7 because this is not part of my complaint. This was
8 something that was introduced by the Government for other
9 reasons in its briefing. But let me clarify the timeline
10 just so it's clear for the record.

11 THE COURT: I'm not talking about the timeline.
12 I'm talking about the OIG report --

13 MR. VARTAN: Sure.

14 THE COURT: -- examined coinage submissions not
15 including the one at issue in this case. Correct?

16 MR. VARTAN: So that's not accurate.

17 THE COURT: Okay. The Government's clearly
18 suggested that, I think.

19 MR. VARTAN: Right. And so I can point Your
20 Honor to why I believe that's not accurate.

21 THE COURT: Go ahead.

22 MR. VARTAN: Okay. So if you look at -- this
23 is Exhibit A. It's ECF 56-2. First I'm going to direct
24 Your Honor to page 43 of the document, Appendix 1,
25 Objectives, Scopes, and Methodology. Now, keep in mind,

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1 this report was drafted or dated August 18th, 2020, so
2 roughly two years after the submission of Portland Mint's
3 coins, and we would say the redemption of Portland Mint's
4 coins.

5 So on page 43, the first black bullet, it says
6 that the OIG observed the redemption and recycling -- and
7 I'm stressing redemption there because they now are
8 saying they watched redemption -- and recycling of coins
9 redeemed -- again, their word -- through the Mint's coin
10 exchange programs at Olin Brass, right -- that is where
11 we redeemed our coins -- from -- and here's the key piece
12 -- July 31st, 2018, meaning one day before we arrived,
13 through August 2nd, 2018, which is the last day of our
14 redemption, which included obtaining coin samples --

15 THE COURT: What was the last date?

16 MR. VARTAN: August 2nd, 2018.

17 THE COURT: Okay.

18 MR. VARTAN: Which included obtaining coin
19 samples from -- and I'm stressing the word again, the
20 redemption. So this is what the OIG said that it did in
21 producing this report.

22 THE COURT: Okay. Is there anything in there
23 that says from Portland Mint?

24 MR. VARTAN: Well, indirectly. And this is
25 what I was going to say on page 28 because now the report

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1 gives color to what was said in the appendix, and I'm
2 happy to read from the second full paragraph on page 28,
3 ECF 56-2. And, Your Honor, that reads in relevant part,
4 "As part of our audit, we observed the Mint's mutilated
5 coin redemption process in which the Mint received" --
6 and here's the key -- "approximately 450,000 pounds of
7 mutilated coins from multiple bulk redeemers." Right?

8 So 427,000 of those 450,000 pounds belonged to
9 us. This was --

10 THE COURT: Do we know that? How do we know
11 that?

12 MR. VARTAN: There's no other explanation
13 because they're saying in the appendix that they observed
14 a redemption at Olin Brass on the same days that we were
15 there in roughly the same amount. So --

16 THE COURT: Without -- without understanding --
17 and, by the way, I mean, both Ms. Vicks and you need to
18 understand that the questions I pose and the statements I
19 make are to try to draw this together --

20 MR. VARTAN: Sure.

21 THE COURT: -- and pull it out. So it's not a
22 question of, you know, making a finding or conclusion or
23 anything of that sort at this point. What -- there was
24 so little joining of some of the issues that I'm playing
25 devil's advocate to some extent with both of you, but --

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1 to try and get a better understanding. But if you're
2 saying that 427,000 pounds of the coinage out of 450,000,
3 you could equally easily argue that why would they take
4 so little from another one and that one all be yours? I
5 mean, I -- what I'm searching for is a nexus to Portland
6 Mint specifically. Yes, it may have been the days that
7 you submitted, but you also don't know whether they that
8 quickly did the melt on your coins in particular.

9 Is there anything in the record that connects
10 this statement that you just read from, which may very
11 well be the Portland Mint? But I need more than that to
12 come to a conclusion.

13 MR. VARTAN: Well, you -- I'm sorry, I didn't
14 mean to interrupt, Your Honor.

15 THE COURT: That's fine.

16 MR. VARTAN: I was saying -- I would say only
17 that you don't need more to come to a conclusion for
18 these purposes because this is a motion to dismiss. And
19 I wish -- certainly I've been begging for more
20 information now, as Your Honor knows, for the better part
21 of a year. We filed this complaint back in April of
22 2020.

23 So I am -- I can only give to the Court the
24 very little information that we've been able to glean or
25 the Government has given to us voluntarily, or I might

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1 say even by mistake given the import of this report. But
2 I have no doubt that were we to engage in discovery,
3 which we're entitled to do -- and I cited, this is
4 important, I think, for the posture of this case because
5 ultimately maybe the one thing that we can agree upon for
6 purposes of today is that the definition of "redeem" is
7 not clearly set forth in a preamble or in a statute.

8 Now, obviously --

9 THE COURT: But the definition of what is not
10 redeemed looks like it comes out of Subsection (c)(6) of
11 the regulation at issue. And we all seem to agree that
12 that's the regulation at issue. But --

13 MR. VARTAN: But there's not a clear
14 definition, though, what redeem means in Subsection
15 (c)(6). It is maybe what it's --

16 THE COURT: But does that matter if there's a
17 clear definition of what's not redeemed?

18 MR. VARTAN: It does.

19 THE COURT: I mean, sometimes it can be stated
20 in the negative. You don't have to have it stated in the
21 positive to have a valid regulation.

22 MR. VARTAN: I would only say that if that is
23 the Government's definition, and what I've put forward in
24 the complaint --

25 THE COURT: I don't think it's the Government's

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1 definition. They haven't said that. I have right now
2 for purposes of talking to you.

3 MR. VARTAN: Right. So for -- but if that's
4 the definition, I would say that would not again comport
5 with common sense because it would blow a hole in the --

6 THE COURT: Well, thank you.

7 MR. VARTAN: -- the regulation. I hope no
8 offense was taken.

9 THE COURT: None was taken. I just couldn't
10 let it slide by.

11 MR. VARTAN: Understood. I probably should
12 have another cup of coffee. So what I was saying, Your
13 Honor, is that would really -- and I'm not accusing the
14 Government of malfeasance. Let me be clear. But it
15 really would allow for a great deal of malfeasance,
16 because even just look at the chronology here. It's our
17 position that the Government took these coins, melted
18 99.99918 percent, and used them to manufacture new coin
19 roll, meaning used them for public benefit.

20 They then said two and a half years later,
21 because we first learned that the coins were
22 "counterfeit" in December of 2020, and someone said -- I
23 think it may have been -- I'm just looking back at my
24 notes here -- that someone had said at one point that
25 essentially this was done with knowledge of the case,

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1 meaning the counterfeit letter was done with knowledge of
2 this prosecution, if you will, but I would say it was
3 done directly in response because --

4 THE COURT: What prosecution are you talking
5 about? There's no prosecution here.

6 MR. VARTAN: Well, I'm saying the prosecution
7 -- this litigation, I should say.

8 THE COURT: Okay. Sorry, as a former assistant
9 district attorney, that word has meaning for me. So --

10 MR. VARTAN: It has meaning for me as a former
11 AUSA, so I understand, Your Honor. But I was saying that
12 letter came in direct response to this litigation,
13 meaning the Government wanted a hook to be able to make
14 all the arguments that it's now making. And so the first
15 that we ever heard the term "counterfeit" formally came
16 literally two and a half years after submission of these
17 coins.

18 So what would prevent the Government, if Your
19 Honor's reading or the Government's reading -- and I
20 understand you're playing devil's advocate in some of
21 this, but if that reading was a fair reading of the
22 regulation, the Government would in every single case
23 take coins in, use them for their benefit, and then
24 whenever it got around to it, issue a letter saying, oh,
25 by the way, the coins that we used for our benefit, they

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1 were counterfeit; we're not going to tell you why.

2 And I think that's another critical piece of
3 all of this because, again, now three years removed from
4 the melt, we still don't even know how the Mint came to
5 the determinations it did. They tested a few hundred
6 coins, Your Honor, according to their own letters, and
7 extrapolated from those few hundred coins to 427,000
8 pounds.

9 And I'm not going to go through this with the
10 Court, but I would encourage Your Honor to go back and
11 look at that OIG audit report, and in particular pages 28
12 and 29 that I was just quoting from about the 450,000
13 pounds, because the OIG takes the Mint to task for
14 sampling too few coins. And, again, they're referring to
15 this redemption, meaning -- I understand it doesn't say
16 Portland Mint directly in there, but they're critiquing
17 what they saw at Olin Brass on July 31st, August 1st, and
18 August 2nd.

19 And if you look at pages 28 and 29, they said
20 -- and, again, I'm just quoting, "We observed the number
21 of coins inspected and sampled by Mint personnel was only
22 a small fraction of the number required per the SOP,"
23 meaning they're taking the Mint to task for taking too
24 few coins from the Portland Mint to draw conclusions or
25 extrapolate that the sampling plan must be followed in

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1 order to have confidence -- and the sampling plan wasn't
2 followed -- that the coins sampled are representative of
3 the entire redemption shipment.

4 And then there's a conclusion in here on page
5 29. This again is all in response to what they observed
6 at Olin Brass, "As a result we found the mint processed"
7 -- so this means -- again, this is further evidence that
8 our coins were used -- "the mutilated coin redemptions"
9 -- again, their word -- "without the capability to
10 authenticate the genuineness of the coins," meaning that
11 now the Mint is saying two and a half years later that
12 the coins were counterfeit, even though they took a
13 sample by the Treasury's own admission that was too small
14 and insufficient to draw conclusions from. And I think
15 that is key to all of this.

16 So I guess my refrain to much of what the
17 Government put forward is the same refrain that we put
18 forward in the brief. This is a motion to dismiss. I
19 understand that there's been a lot of back-and-forth in
20 the case. Maybe there were times when things were not
21 clear. Your Honor's certainly done a good job of making
22 things clearer and crystallizing the issues, but the
23 Government can't now come in on a motion to dismiss two
24 and a half years later after these coins were used, and
25 say the coins were counterfeit, and because we, the

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1 Government, are saying the coins are counterfeit, you
2 don't get the benefit, Plaintiff, of the well-pled
3 allegations in your complaint. That's just not how this
4 works.

5 And if these are the two documents that we have
6 in our possession, almost by happenstance at this point,
7 what would we get through discovery, and that's why we
8 cited in making a determination around what "redeem"
9 actually means, we cited to the Ford Motor case where
10 this Court was charged with determining the definition
11 of "wages" under statute, and there they allowed for
12 discovery of internal documents at the IRS, bearing upon
13 certain reports that were issued by the IRS. Same thing
14 in the Marriott case that we cited in our brief where the
15 definition of "liability" was at issue.

16 So I would end this section by saying that
17 redeem is not -- is not clear in my mind, at least, in
18 the -- in the regulation. I think that we certainly have
19 the much better of the argument, but I know that under
20 the governing law we're entitled to discovery to show
21 that we do.

22 THE COURT: Well, let me ask you this: If the
23 underlying -- I think you're challenging the underlying
24 rectitude of the counterfeit or purpose to defraud, or
25 misrepresentation, or further criminal activity,

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1 conclusion -- I just did it out of order, actually, from
2 memory, as now that I'm looking at the regulation, but
3 it's all in there.

4 If you're challenging the rectitude of those
5 findings, is that enough to create a challenge of the
6 regulatory activity undertaken by the agency?

7 MR. VARTAN: So I would say that what we're
8 challenging here -- or not even challenging. We're just
9 saying that there is a regulation, it's a money-mandating
10 regulation, and I would note that Subsection (d), as we
11 noted in our brief, doesn't say "can pay" or "should pay"
12 or "may pay." It says "will pay" when the coins are
13 being redeemed.

14 Our argument, I think, is pretty
15 straightforward in the sense that we're saying this is a
16 money-mandating regulation, the coins were redeemed, and
17 whether the coins were counterfeit, genuine, or something
18 in between, in redeeming those coins under the
19 regulation, the Government is duty-bound to pay us the
20 amounts they set forth in the regulation.

21 And so that's why I do think that there is a
22 fair amount of confusion. Some of it may be precipitated
23 by Plaintiff, some of it may be injected by the
24 Government, but at heart -- and this is why I focus some
25 in the brief on the Kanemoto case -- I think this is no

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1 different from Kanemoto in the sense that we're asking
2 this Court to define "redeem."

3 And this is why I was saying at the beginning
4 that in some ways this really is an argument on the law,
5 and, you know, could be ripe for summary judgment with
6 the benefits of discovery; how does this Court define
7 "redeem"?

8 If the Court defines "redeem" to mean that --
9 as we say, that the -- that when coins are melted and
10 used to make new coinage, that's redemption, then we're
11 entitled to payment at least for 99.99918 percent. If
12 the Court says, no, redemption means something else, then
13 we wouldn't be entitled to payment under the regulation,
14 but that's something this Court is well within its rights
15 and bounds and ability to determine.

16 THE COURT: So since we don't know -- or do we
17 know -- that the coinage was melted and redeemed, what's
18 the status of that? Do you still need discovery to be
19 absolutely sure of that?

20 MR. VARTAN: Well, we know for sure -- and
21 certainly I'm happy for the Government to weigh in, but
22 we know for sure from the Government's briefing that all
23 but a few hundred coins were melted. I have -- I
24 repeatedly asked Ms. Vicks, and also her predecessor,
25 were they used to manufacture new coinage, and that was

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1 never -- I was never provided an answer. I have to
2 imagine, given that we've been so out front in saying
3 that the coins were used to manufacture new, genuine --
4 and I stress that -- U.S. coins, that if that were not
5 the case, we would have heard about it.

6 THE COURT: Well, we don't really know from
7 what we've seen in the record before the Court.

8 MR. VARTAN: Correct, because, again, we
9 haven't had discovery. So I would submit that our
10 allegation carries the day.

11 THE COURT: All right. Let me ask you another
12 question. Subsection (c)(7) of the regulation --

13 MR. VARTAN: Mm-hmm.

14 THE COURT: -- gives almost unfettered final
15 authority to the director of the United States Mint
16 regarding redemptions of bent or partial coin
17 submissions. Tell me what you think that means.

18 MR. VARTAN: I think that that means that the
19 director of the Mint has the absolute right to -- I'll
20 put it in the context of this case. The Mint and the
21 director have the absolute right to take in our 427,000
22 pounds, evaluate them, and say that they're counterfeit,
23 they're not going to redeem them, and therefore not use
24 them to make new coinage. But that's not what happened
25 here.

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1 THE COURT: Okay. So partial coin submissions
2 is the part -- what you're talking about? I mean, these
3 weren't bent, right? These were -- if anything, they
4 were -- or were they partially bent or were they mostly
5 the issue of counterfeit because they had the wrong
6 percentages?

7 MR. VARTAN: So my understanding is -- but I'd
8 have to go back and look at the definition. There is a
9 definition of mutilated and uncurrent coins. I believe
10 this is just a definition -- bent and partial, I believe,
11 is the definition of mutilated coin, but I'm just
12 speaking off the top of my head.

13 THE COURT: Okay. And that definition would be
14 where? In the statute?

15 MR. VARTAN: I believe it's in the regulations.
16 It's possible. I can certainly supplement the record if
17 Your Honor wants with a letter.

18 THE COURT: I do want that, yes.

19 MR. VARTAN: Sure.

20 THE COURT: If you can get that to us within a
21 week or so.

22 MR. VARTAN: Not a problem.

23 THE COURT: All right, very good.

24 MS. VICKS: Your Honor, I would --

25 THE COURT: Ms. Vicks, you're welcome to do

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1 that as well. All right. Let's --

2 MS. VICKS: Well, I would just note that
3 Subsection (b) has definitions --

4 THE COURT: Excuse me, it's not your turn, Ms.
5 Vicks. It's not your turn.

6 MS. VICKS: I apologize.

7 THE COURT: Mr. Vartan, let's talk, then, if
8 this is -- well, I don't want to characterize it for you,
9 although I'll ask it as a question. Is this your primary
10 basis for the complaint? In other words, based on what
11 you know now, or perhaps knew before, are Counts 2, 3,
12 and 4 counts that you feel you can, as an officer of the
13 court, defend? I know everybody throws in a takings
14 claim when they think they have a contract, but here you
15 don't even have a contract, or what's the true basis for
16 a contract? I don't see the contract, and I'm not
17 playing devil's advocate with you.

18 MR. VARTAN: Yeah, no, I understand. So I
19 would say that I can certainly defend all three counts
20 as an officer of the court. I'm happy to admit, or
21 would readily admit, that I would agree with Your Honor
22 that the contract claim is weaker than Counts 1 and 4,
23 meaning the regulatory violation and the takings claim,
24 but I think it's absolutely defensible, and I think it
25 should withstand a motion to dismiss because, again, I

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1 keep coming back -- and I apologize for being a broken
2 record of sorts -- to where we are. Even though the
3 case is --

4 THE COURT: Let me ask you -- let me interrupt
5 before you go much further.

6 MR. VARTAN: Sure.

7 THE COURT: The voluntary release of the
8 coinage to the U.S. Mint, I mean, you brought it to them.

9 MR. VARTAN: Correct.

10 THE COURT: You agreed to be part of the
11 program. You agreed to be part of the regulatory
12 structure of the program. How does that create a
13 contract on the part of the Government? It may create,
14 you know, a regulatory program in which both sides have
15 responsibilities, but that's not your traditional
16 contract.

17 MR. VARTAN: It's certainly not a traditional
18 contract. I would agree with Your Honor. But I would
19 come back to some of the back-and-forth in the briefs and
20 I would look to the DNN case, in particular, which I know
21 both sides provided ample briefing on. But let me just
22 get out the relevant quote from there.

23 So in DNN, that was one of the Winstar cases.
24 I know Your Honor is familiar with it. But --

25 THE COURT: Well, that's -- that's part of the

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1 problem. I mean, if you're alleging a contract, the
2 takings goes away. But here your contract allegation is
3 weak, so potentially you would have that takings. But
4 you voluntarily submitted, and Winstar I don't think helps
5 you a whole lot.

6 MR. VARTAN: Well, in DNN, I would submit, Your
7 Honor, that it does in the sense that, again, we don't
8 have discovery at this point. But we have put forward
9 nonfrivolous allegations, which is all we're entitled to
10 -- all we're required to do, I should say -- that there
11 was a contract.

12 And the reason I say that, yes, it was against
13 the backdrop of the regulations, and, yes, the amount to
14 be paid was informed by the regulations, but we've also
15 submitted more than that in the sense that, number one,
16 the complaint speaks about a significant back-and-forth
17 between Anthony Holmes and Adam Youngs, both prior to and
18 after the melt, and during, by the way. And I would note
19 that the reason I was citing to DNN is because we agree
20 that in that case there is the notion of the plaintiff
21 needing to provide "something more." And I think in DNN,
22 they define the something more as manifest assent by the
23 Government.

24 THE COURT: So are you using DNN to support
25 that there was a contract, or are you using it to support

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1 that a motion to dismiss is inappropriate?

2 MR. VARTAN: Both. Because what I'm saying is
3 DNN stands for the proposition -- and DNN, of course, was
4 on summary judgment, but DNN stands for the proposition
5 that you can show that manifest assent, either by
6 documents or -- again, I'm quoting from DNN -- "witness
7 testimony about the words and actions of relevant
8 government officials."

9 So what I'm saying is we have alleged a
10 nonfrivolous allegation of a contract, and we're entitled
11 to proceed to discovery. It may turn out that this is
12 not a viable contract either because there was a
13 mutuality of intent, there wasn't unambiguous offer or
14 acceptance, but we're at so preliminary a stage here that
15 we are entitled to put forward our various causes of
16 action, even if they're antagonistic, at least at this
17 stage, toward one another.

18 So I --

19 THE COURT: Well, if, for instance, I were to
20 decide that the motion to dismiss should be denied with
21 respect to Count 1, would you be sanguine if we deferred
22 Counts 2, 3, and 4?

23 MR. VARTAN: The answer to that is yes because
24 what I would say to the Court, and I probably have said
25 this at a previous status conference, these are all --

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1 these counts are variations on a theme. The relief that
2 we're seeking is the money that we're entitled to under
3 the regulation, the \$8.51 million.

4 We believe that we could get there either by a
5 regulatory violation, by a contract breach, or by a
6 taking. And what is critical for us at this point is
7 just that we have "white," is really what it comes down
8 to. If you said that I'm going to allow this case to
9 proceed only on Count 1, but three years now removed from
10 August 18th when they took 427,000 pounds of coins from
11 us, we're going to finally allow you to see what was
12 happening behind the scenes, I would be more than
13 sanguine.

14 THE COURT: Let's talk about a taking for a
15 moment. What about the proposition that Ms. Vicks put
16 forth about voluntarily surrendering the coinage to the
17 Mint -- the U.S. Mint -- as defeating a takings claim
18 because there's not much voluntary about most takings
19 claims?

20 MR. VARTAN: Mm-hmm. Agreed. But it's wholly
21 unsupported by any precedent. I read Love Terminal both
22 before I submitted my response and I read it after her
23 reply. I read it again last night. It simply is being
24 misquoted by the Government.

25 THE COURT: It doesn't matter whether it's

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1 misquoted or not. The concept of voluntarily
2 surrendering with a typical takings claim seems to me
3 incongruent, and I'm trying to understand how you get
4 there. I mean, the Government generally takes it against
5 the owner's will, and I'm not sure I've ever seen one
6 when there has been a voluntary surrender.

7 That can be eminent domain in other than this
8 kind of case where they then go to damages and, you know,
9 work it, but even that's not voluntary. You know,
10 there's nothing in the takings area that looks like it --
11 it's a voluntary surrender of the property.

12 MR. VARTAN: Well, I guess two points on that.
13 Number one, Love Terminal, which is what the Government
14 is waving, is not applicable. And what I would say also
15 is we cited two cases --

16 THE COURT: But that doesn't matter. I'm not
17 asking about Love --

18 MR. VARTAN: No, I understand. I understand.
19 I think Prudential Insurance, though, is close in
20 concept, meaning there, there was a voluntary release
21 entered into by the Government, and -- or Prudential and
22 the Government; it was, of course, voluntary, and the
23 Government overstayed its welcome, meaning it was a
24 holdover tenant. And it was made clear, I think, in
25 Footnote 13 to that case that there was a breach of

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1 contract, meaning a breach of the lease agreement, but
2 there was also the potentiality of a taking claims based
3 upon a voluntarily entered-into contract.

4 And I also cited another case in the brief, the
5 name of which is escaping me, so if Your Honor gives me a
6 moment --

7 THE COURT: I can find it. That's all right, I
8 can find it.

9 MR. VARTAN: Okay. But I did cite another --
10 oh, here, I have it in front of me. Apologies, Your
11 Honor. We also cited to System Fuels, which, again, was
12 -- it had to do with the disposal of nuclear waste, and,
13 again, it denied a motion to dismiss a takings claim
14 despite the Government's argument that the right taken
15 was created solely by a voluntarily entered contract.

16 So I agree with Your Honor that this is not
17 maybe the typical takings fact pattern, but I think we've
18 come certainly closer in Prudential or System Fuels than
19 the Government did in Love Terminal.

20 THE COURT: All right. What else do you need
21 me to know from your perspective?

22 MR. VARTAN: The only thing I think I would
23 say, Your Honor, on the takings piece, and that's why I
24 wanted to be forthright with the Court that I think
25 Counts 2 and 3 are not as strong as Counts 1 and 4, I

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1 think that Count 4, the takings claim, is a paradigmatic
2 takings claim, maybe other than the nuance of the fact
3 pattern at the beginning.

4 And I say that because all of the cases that
5 were cited in the Government's brief -- and so now I'm
6 talking about cases like Rith and Lion Raisins, those are
7 regulatory takings. This is a physical taking, meaning
8 the Portland Mint's coins -- and I did pull out something
9 that Ms. Vicks said which struck me. She said, he could
10 have done anything he wanted to with his mutilated coins
11 prior to submission.

12 And so that's exactly my point. These are his
13 coins. It's not premised on a violation of the
14 regulations. We're not saying that he had a property
15 interest once redemption was rejected. That's not what
16 we're saying. We're saying that he had a preexisting
17 property right in these coins. It was his personal
18 property that the Government took and used for public
19 purpose, meaning the manufactured new, genuine, U.S.
20 coinage, and they didn't pay him for it. And that's,
21 again, a paradigmatic taking, certainly as I understand
22 the Fifth Amendment takings clause.

23 And so I think that there's been a lot of
24 twisting and contorting in citing the cases that are not
25 physical taking cases like this case is. And I probably

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1 would end, Your Honor, on the Lion Raisins point because
2 that was something that the Government waved around in
3 its brief saying here's evidence that we, the Government,
4 are right.

5 But there's a piece of Lion Raisins that's
6 exactly on point here because Your Honor probably knows
7 that there were two pieces -- there were two takings
8 violations alleged in Lion Raisins. One was born from a
9 purported violation of the Raisin Advisory Committee
10 order and associated regulations. And the Federal
11 Circuit there said that is not a viable taking because
12 the property interest is only born from a regulatory
13 violation.

14 But there was a second takings violation that
15 was alleged, and that was of the raisin storage bins.
16 And those were property of Lion Raisins. They were Lion
17 Raisins storage bins. And so in Lion Raisins, the
18 Federal Circuit said that would have been a viable
19 takings theory because they were Lion Raisins bins but
20 for the fact that there was a comprehensive
21 administrative review process to challenge the taking of
22 the bins, so meaning but for that being in existence,
23 there would have been a viable takings claim.

24 And that's because the bins belonged to Lion
25 Raisins in the same way these coins belong to us. So --

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1 and there is no, of course, administrative process to
2 challenge this. So I would end there, Your Honor.

3 THE COURT: All right, very good.

4 Ms. Vicks, please don't repeat what you've
5 already said but respond to anything that you feel you
6 need to respond to in Mr. Vartan's discussion.

7 MS. VICKS: Yes. Thank you, Your Honor. There
8 are just a couple things I would like to point out to
9 Your Honor in response to Mr. Vartan's presentation, and
10 one has to do with the Mint's SOP. Let me find it. The
11 -- Mr. Vartan said that, you know, counterfeit coins
12 should be segregated and not -- basically, I think he was
13 implying they should be returned to the submitter. And I
14 would note that the SOP, which I can't find, which is
15 annoying, on page 9 and 10 in 6.9.1 and 6.9.2, discusses
16 that counterfeit coins are not even considered mutilated
17 coins and will not be redeemed.

18 And, further, in 6.9.1, which is on page 10 of
19 the SOP, the Mint will not accept for redemption
20 mutilated coin that is not readily and clearly
21 identifiable as genuine U.S. Mint coinage and
22 distinguishable by denomination. And then again we see
23 in 6.9.2, unacceptable items not classified as mutilated
24 coins that the U.S. Mint does not redeem, number four,
25 counterfeit coin. And then it notes that, you know, that

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1 would involve also a report to the OIG.

2 So it's --

3 THE COURT: Well, what about the fact that in
4 this case we don't know for sure, but there is at least
5 the allegation that it was melted into new coinage? Does
6 that change the picture a bit? And if it was melted into
7 new coinage, presumably or potentially it was not
8 illegitimate coin, or the Mint theoretically shouldn't
9 have put it into new coinage.

10 MS. VICKS: Sure, Your Honor. I don't think
11 that is actually relevant to the determination of
12 redemption and what the Plaintiff has actually pleaded,
13 which is that he submitted coins and that on delivery
14 they were redeemed, and he doesn't -- he even said -- Mr.
15 Vartan even said, you know, it doesn't matter if they
16 were counterfeit; we should have been paid. So he
17 appears to contend that anything after delivery actually
18 doesn't matter. What matters is that they submitted --

19 THE COURT: No. He said -- I don't think
20 that's what he said, Ms. Vicks.

21 MS. VICKS: -- the coins.

22 THE COURT: I think he said once it was
23 melted and used in what was theoretically legitimate
24 coinage.

25 MS. VICKS: Sure. And if the coins were

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1 melted, I mean, they're just metal, and they can be
2 melted and used to make other things. I mean, it has no
3 bearing on whether they were counterfeit because
4 counterfeit coins are certainly also made of metal. And,
5 in fact, as I think this Court is aware through the
6 numerous pleadings in this case, the metallurgical
7 composition of coins is set forth in statute and is
8 easily mimicked. And so a coin may appear to be genuine
9 if it looks like it, mimics, you know, the clad -- the
10 copper core and the clad -- whatever is clad outside a
11 quarter, and it still may not be a genuine coin, you can
12 still melt it. And when metal is melted, it's still just
13 metal. So I would point out that --

14 THE COURT: But also presumably the Mint, which
15 has the responsibility to make proper coinage, would not
16 take improper materials to put into that new coinage, or
17 is that a foolish statement?

18 MS. VICKS: It would not take coinage that are
19 contaminated or otherwise un reusable. But if someone is
20 submitting coins that are actually counterfeit, they may
21 be counterfeit for reasons other than the composition of
22 the coin itself. And so the metal itself is just metal.

23 THE COURT: Okay.

24 MS. VICKS: It's basically scrap metal, but it
25 is also illegal because it is contraband as it's been

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1 passed off as genuine U.S. currency.

2 I would also just like to note that we --

3 THE COURT: Well, let me ask you this: Have
4 you at this point -- you, the Government, not you
5 personally, but you, the Government, actually given the
6 report of the metallurgy content of what you're claiming
7 is counterfeit to the Plaintiff?

8 MS. VICKS: No, Your Honor. The metallurgical
9 content?

10 THE COURT: Yeah, of the alleged counterfeit
11 coinage.

12 MS. VICKS: We have -- no. But, you know,
13 metallurgical composition can be clearly mimicked and
14 easily mimicked as set forth in a statute. So as long as
15 you can make something that looks like, you know, the 25
16 percent core and the clad outline, say, of a quarter, it
17 doesn't mean much for going towards the authenticity of
18 the coinage, is my point.

19 THE COURT: I frequently say that, you know,
20 both parties are in the business at an oral argument and
21 briefing to try to fool the judge, and you've managed,
22 both of you, to raise enough issues that I don't know the
23 answer here. I will say this to you, at this point, I'm
24 going to have to sort through both the summary judgment
25 question, the allegations, the cases you've cited, and

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1 we've obviously done enough prep to have a pretty good
2 idea, but not as to the answer.

3 And some things have been raised today that
4 make me think a little bit further beyond where I was
5 thinking even last night as I was working on it.

6 I will say this to you, Ms. Vicks: Given where
7 we are in the case, I would find this extremely improper
8 if the Mint -- U.S. Mint -- were to do anything to
9 destroy the existing, retained amount of coinage from
10 this delivery. I don't know that it's going to be
11 relevant, but the answer we got today when in the past --
12 or it was not consistent with some of the past answers
13 about whether there was coinage retained. Ultimately, we
14 got, I think, the consistent answer, but I just want you
15 to be sure, you're obviously in charge of this case,
16 which puts you in a miserable position potentially with
17 the Mint.

18 You've just disappeared. Are you there, Ms.
19 Vicks?

20 MS. VICKS: Sorry, I am here. It's -- sorry, I
21 have to plug in my phone. It's on low power mode. Hold
22 on. My apologies. I am here and I hear you clearly.

23 THE COURT: Well, I'm going to wait until
24 you're back.

25 MS. VICKS: Okay.

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1 (Brief pause.)

2 MS. VICKS: I'm back. I apologize, Your Honor.

3 THE COURT: All right. Not a problem. That's
4 happened to me as well.

5 But I'm just saying to you at this point,
6 status quo, keep it, don't let your client destroy the
7 remaining coinage. If we do get past the motion to
8 dismiss, that's obviously going to become relevant. So I
9 hope you hear me loud and clearly. Unfortunately, for
10 you --

11 MS. VICKS: I do.

12 THE COURT: -- you're the counsel of record, so
13 it's on you. And I know that -- what's the name, Apryl
14 -- what's her full name?

15 MS. VICKS: Whitaker, Your Honor.

16 THE COURT: Whitaker. I wrote it down so
17 quickly that I actually -- can you spell that for me?

18 MS. VICKS: Yes, W-h-i-t-a-k-e-r.

19 THE COURT: All right. And, Ms. Whitaker hears
20 me. Are you still there, Ms. Whitaker?

21 MS. WHITAKER: Yes, Your Honor. We take the
22 retention of the samples very seriously.

23 THE COURT: Well, I hope you do. All right.

24 All right. So now we're back to you, Ms.

25 Vicks.

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1 MS. VICKS: Yes. I also wanted to point out
2 that a definition of bent and partial coins is contained
3 at Section B of 31 CFR 100.11 that Your Honor was asking
4 about that. And the regulation itself actually talks
5 about bent or partial coin, and we have been referring to
6 that as mutilated coin. I believe we consider those to
7 be synonymous.

8 But to the extent Your Honor is looking for a
9 definition, that is contained in Section (b), number (i)
10 is bent coins, number (ii) is partial coins, and number
11 (iii) defines participants in the program.

12 I wanted to briefly address the OIG report that
13 Mr. Vartan referenced. And we did respond to his
14 reference to the OIG report in a footnote in our reply
15 brief, Footnote 4, in which we stated that the report is
16 hearsay and that any use of the word "redemption" there
17 is not reflective of the -- of an in-depth testing or
18 anything that was done -- you know, of the Mint's actual
19 determination of redemption as reflected in the denial
20 letter, which is ECF Number 34.3. So we did address that
21 in the footnote there.

22 THE COURT: What's your take on whether the
23 amounts that Mr. Vartan talked about, the 427,000 pounds
24 out of the 450,000 pounds, was the Plaintiff's coinage
25 melted down? Is there anything that you'd want to

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1 comment as to his remarks with regard to that? He made
2 some mental leaps, admittedly, but what about you?

3 MS. VICKS: I agree that the amounts
4 represented in the report and the dates of the melt are
5 consistent with what Portland has alleged in its
6 complaint.

7 THE COURT: You're saying it was the Portland
8 Mint coinage even though Portland Mint's name is not
9 used?

10 MS. VICKS: I believe that's correct, Your
11 Honor.

12 THE COURT: What's your basis for that?

13 MS. VICKS: I am -- well, I am -- so there is
14 -- it's not mentioned in the report, but the time -- the
15 timing and the amount, as Mr. Vartan said.

16 THE COURT: So is the Government conceding that
17 point, that it is the Portland Mint coinage?

18 MS. VICKS: I -- I'm -- yes, the auditors were
19 there when Portland Mint submitted its coins.

20 THE COURT: You're not answering my question.

21 MS. VICKS: I'm sorry.

22 THE COURT: I know they were there when
23 they submitted it. We're talking about what happened
24 next.

25 MS. VICKS: Right. So the most I can concede

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1 at this point is that the auditors were there when
2 Portland Mint submitted, and based on the report and the
3 timeline and the amount, they witnessed the melt and it
4 does say that that was mixed bulk submitters. I don't
5 know without further conversation with the Mint which
6 melts may have been witnessed.

7 THE COURT: Has that been traced, to your
8 knowledge?

9 MS. VICKS: I -- I have no knowledge about it
10 either way.

11 THE COURT: How about Ms. Whitaker, does she
12 have knowledge?

13 Ms. Whitaker?

14 MS. WHITAKER: This is Ms. Whitaker. I have no
15 personal direct knowledge. However, I agree with Ms.
16 Vicks' statement regarding this report.

17 THE COURT: You agree with Mr. Vartan's
18 statement or Ms. Vicks' statements, which are shy of what
19 Mr. Vartan has said?

20 MS. WHITAKER: I agree with DOJ's position on
21 the report.

22 THE COURT: All right. That's not really a
23 position, saying we don't know.

24 All right. Okay. Anything else, Ms. Vicks?

25 MS. VICKS: Yes, one last thing, Your Honor.

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1 In regards to the right to be paid for a submission,
2 whether it's under a regulatory theory or a takings
3 theory, the property right to be paid is created in the
4 regulations. If you have a mutilated coin, if you have
5 a bulk submission of mutilated coins, the only way you
6 can be paid from the Mint for that is through submission
7 to this program --

8 THE COURT: We're talking -- you're talking at
9 each other again when you use the term "submission."

10 MS. VICKS: I'm sorry.

11 THE COURT: Mr. Vartan was pretty clear to
12 take it to the next step of melting into future coin and
13 not stop at submission. Redemption does not occur at
14 submission. That's the one thing we probably can all
15 agree on. But it's that next step or two depending upon
16 how you look at the regulations that we're talking about
17 in terms of redemption.

18 MS. VICKS: Sure. And I would say I agree
19 with Your Honor that redemption does not occur upon
20 submission. It occurs pursuant to the Mint's
21 application of its regulatory process, and that the
22 right to be paid for the submission to receive
23 redemption is created by the regulations.

24 THE COURT: And if we take it that next step
25 and it's the melting and use of the coin, which is, I

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1 think, what Mr. Vartan was saying, that is where he gets
2 his taking from. What's your -- what's your position on
3 that?

4 MS. VICKS: That he -- that melting and reuse
5 of the coin being a taking has to account for the fact
6 that the Portland Mint voluntarily submitted those coins
7 for participation in a regulatory program and that the
8 melting and reuse does not -- and then the Mint kept the
9 coins, melted them, and determined that they were not
10 redeemable under the regulations. And so Portland Mint
11 has to account for why the Mint lawfully had its
12 property, which includes this entire process.

13 THE COURT: And this is why I'm having sort of
14 trouble with this, because you added in there "kept the
15 coin." And they only kept a very small percentage of
16 the coin. And it's not that percentage, even, that Mr.
17 Vartan is talking about as much. So --

18 MS. VICKS: Yes. I apologize. I was using
19 "kept" as in they did not return any part of the
20 submission. So --

21 THE COURT: Okay. That's helpful. All right.
22 Anything else?

23 MS. VICKS: No, Your Honor.

24 THE COURT: All right. You've given me a
25 lot to think about, even beyond what I thought I had

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1 very carefully done last night and during the previous
2 part of this week. I honestly need to go back and do
3 some very deep dives here and decide what we're going
4 to do.

5 Mr. Vartan, you've got a submission to us,
6 and, Ms. Vicks, you can have the same submission by the
7 end of the week if you want. And then we'll go forward
8 from there.

9 MS. VICKS: I'm sorry --

10 THE COURT: I am -- let's be very clear, Mr.
11 Vartan. You want to articulate what that submission is
12 so that I can be sure that we've got that right? And I
13 think from Ms. Vicks' face, I'm assuming she would like
14 that as well.

15 MR. VARTAN: Sure. I think Your Honor --

16 THE COURT: Even when we're not in the
17 courtroom, we can still watch people. So, go ahead.

18 MR. VARTAN: I think Your Honor had wanted
19 the definition of bent and partial coins. And I was
20 going to submit a letter on that. But Ms. Vicks is
21 correct that the definition was earlier in the actual
22 regulation, 31. CFR 100.11. So I'm happy to still
23 submit a letter if Your Honor would like, but
24 otherwise --

25 THE COURT: No.

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1 MR. VARTAN: -- I would agree with Ms. Vicks.

2 THE COURT: All right. I don't think we have
3 to -- all right.

4 Very good. All right. I thank you for your
5 participation in this morning's hearing. As I said,
6 you've given us something to think about, and we'll move
7 forward from that to try to figure this out. I may
8 still, depending upon how easy it is to trace -- and
9 that's the problem, so many of these issues were not
10 joined -- still ask you, but we're going to take a look
11 at it and see if we can trace it easily on whether this
12 is just a straight motion to dismiss or whether it is,
13 in fact, something that needs further consideration of
14 whether it converts to summary judgment because of some
15 of the documents. And if we can trace it easily, we'll
16 do it on our own. If not, we'll come back to you to ask
17 you to do it.

18 Does the reporter have any questions?

19 THE REPORTER: Yes, Your Honor, if they could
20 stay on, I do have a couple clarifications on cases and
21 a couple names mentioned.

22 THE COURT: All right, very good. For those
23 of you on my staff, we'll call you after we close out
24 the Zoom. And thank you all; appreciate your time.

25 MR. VARTAN: Thank you, Your Honor. Have a

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1 nice weekend.

2 THE COURT: Bye-bye. Thank you.

3 MS. VICKS: Thank you, Your Honor.

4 (Whereupon, 12:54 p.m., the hearing was

5 concluded.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, George Quade, court-approved transcriber,
4 certify that the foregoing is a correct transcript from
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6 proceedings in the above-titled matter.

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10 DATE: 12/30/2021

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